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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased
Appellant

v.

KERR-McGEE CORPORATION and KERR-McGEE NUCLEAR CORPORATION,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the federal Atomic Energy Act preempts the application of state punitive damages law where defendant was found guilty of oppressive or malicious infliction of personal injury and property damage, and the injury was caused by plutonium from defendant's federally regulated nuclear facility.

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IN THE
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BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,
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v.

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Appellees.

BRIEF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

The States joined herein file this brief amicus curiae in support of Appellant's Jurisdictional Statement, pursuant to Rule 36.1 of the Rules of the Supreme Court.

INTEREST OF AMICI

At issue here is the proper relationship between Federal and State governments. This is the first reported federal case holding a state remedy for tortious irradiation of persons or property preempted under the Atomic Energy Act or where

exemplary damages have been singled out for preemption under any statute. In its decision below, Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981), the Court of Appeals for the Tenth Circuit ruled that it is unconstitutional to allow a jury to impose punitive damages for oppressive or malicious conduct, 23 Okla. Stat. § 9 (1951), if the injury was caused by radioactive materials handled by a company which was licensed by the Nuclear Regulatory Commission (NRC).

The Court of Appeals' holding introduces a broad new preemption test to this sensitive area of constitutional adjudication. If not reversed, this uncharted expansion of federal preemption beyond its present contours could seriously upset the carefully maintained balance in federal-state relations reflected in contemporary preemption doctrine. The decision of the Tenth Circuit Court of Appeals ignores recent re-

finements of the doctrine by which this Court has presumed valid the exercise of traditional state police powers not in clear and fundamental conflict with federal law. It overlooks a decade of development of Congressionally-approved state involvement in radiation matters, the contemporaneous shift in Congressional emphasis away from promotion of the nuclear industry over other forms of energy, and the transfer of energy promotion functions to the Department of Energy, leaving the NRC with the exclusive purpose of regulation for public health and safety.

Moreover, it draws into question the application of punitive damages law, and other state laws that provide civil or criminal penalties for willful or malicious conduct, in many areas where state law parallels, or "substantially competes," 667 F.2d at 923, with federal regulation. The Court of Appeals erroneously considered

this new expansive preemption test to have been mandated by this Court's summary affirmance in Northern States Power Co. v. Minnesota, 447 F.2d 1143, (8th Cir. 1971), aff'd mem. 405 U.S. 1035 (1972). Amici consider this case to frame important issues of federalism in which each of the states is interested and upon which this Court should provide guidance. By this brief amicus curiae the states joined herein support appellant's request that the substantial federal question which they present be accorded plenary consideration by the Supreme Court, so that the decision of the Court of Appeals may be reversed.

STATEMENT OF THE CASE

The representative of the estate of Karen Silkwood brought this tort action for injury caused by plutonium from defendant's federally regulated nuclear facil-

ity. The jury in this diversity suit, finding the defendants' conduct oppressive and malicious, awarded, in addition to actual damages for personal and property injuries, $10 million in punitive damages. The District Court upheld the punitive damages award, Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 590-91 (W.D. Okla. 1979). Chief Judge Theis rejected the claim that the federal preemption doctrine precluded award of common-law remedies for radiation injuries. On defendants' appeal, this decision was reversed in part by the Tenth Circuit, with Judge Doyle dissenting, 667 F.2d at 922-23. Rehearing, and rehearing en banc, were denied on February 19, 1982. Appellant's Jurisdictional Statement was filed on May 20, 1982.

SUMMARY OF ARGUMENT

In numerous decisions the Supreme Court

has held that a heavy presumption lies against finding preemption of state laws enacted pursuant to the states' police powers, especially laws that protect public health and safety. Moreover, the Court has been particularly reluctant to find an implied preemption of state tort law. Such presumptions should have counseled restraint in this case. But the Court of Appeals nevertheless held preempted the application of Oklahoma's punitive damages law to the defendant's oppressive or malicious handling of an ultrahazardous radioactive material, without finding any conflict with federal law or any express statement by Congress that the Atomic Energy Act was intended to have such broad preemptive effect.

In fact, the Oklahoma statute is entirely consistent with the Act's central purpose, the protection of public health and safety. Congress has expressly rejected

any purpose to compromise protection of public health as a means of promoting nuclear power, or any purpose to favor nuclear power over other forms of energy with a governmentally-sponsored advantage, such as immunity from state tort law.

The Court of Appeals found the Oklahoma statute impliedly preempted without applying to the Act and its legislative history any of the accepted criteria for determining when Congress can be said to have impliedly preempted state law. Instead the Court of Appeals created an entirely new criterion, unsupported by any precedent, of whether a state law "substantially competes" with federal law.

The application to this case of the criteria approved by the Court for determining when a state law has been impliedly preempted by Congress unmistakably reveals that Congress did not impliedly preempt the Oklahoma punitive damages law. On the

contrary, Congress has expressly stated its intent that the preemption doctrine applied in the Northern States Power (NSP) case, 447 F.2d 1143, should not apply to state regulation of airborne radiation hazards. Congress also expressly stated its intention that for injuries of the kind suffered by Karen Silkwood, existing state tort remedies -- without any exception for exemplary damages -- should be preserved.

This case can be easily distinguished from NSP, the only precedent of this Court upholding federal preemption of state legislation on nuclear matters. There is no precedent for singling out punitive damages from other state tort remedies for preemption.

This case approaches the sensitive area of state power that the Tenth Amendment was designed to protect. It also raises serious due process issues in that it

takes away the right to sue for full tort recovery under state law without giving any rights in return. The Act held here to preempt state tort law creates no substitute private cause of action. By seriously invading the historic powers of the states, the Court of Appeals' preemption decision sharply departs from the trend of decisions by which this Court has sought to preserve the constitutional balance between state and federal legislative competence and thereby safeguard an important pillar of our democratic order.

ARGUMENT

I. THE OKLAHOMA PUNITIVE DAMAGES STATUTE NEITHER CONFLICTS WITH THE ATOMIC ENERGY ACT NOR HAS CONGRESS EXPRESSED AN INTENT THAT IT BE PREEMPTED BY THE ACT.

1. THERE IS NO CONFLICT BETWEEN THE FEDERAL AND STATE LAWS.

The two kinds of conflict recognized by the Court as triggering supremacy clause scrutiny are:

> [A] a square conflict with particular provisions of federal law or [B] general incompatibility with basic federal objectives. City of Philadelphia v. New Jersey, 437 U.S. 617, 621 n.4 (1978).

A) Kerr McGee could comply with the federal nuclear regulation and at the same time conform to the standard of care required by the Oklahoma exemplary damages statute.

This is not a "square conflict" case where "compliance with both federal and state regulations is a physical impossibility" or where there is an "inevitable collision between the two schemes." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Kerr-McGee can avoid oppressive, malicious or reckless handling of radioactive materials and at the same time comply with the federal policy that NRC licensees

> should ... make every reasonable effort to maintain radiation exposures, and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable .... 10 C.F.R. § 20.1(c).

Obviously the Act and the NRC regula-

tions implementing the Act neither require nor encourage any of the extremely hazardous kinds of conduct for which exemplary damages might be awarded under Oklahoma law. Nor were any of the culpable acts involved here "protected by federal law," Automobile Workers v. Russell, 356 U.S. 634, 640 (1958).

B) The Oklahoma statute does not frustrate or present an obstacle to the accomplishment of the full purposes of the Atomic Energy Act.

The Court has long held, in the words of a well worn passage, that

> Our primary function is to determine whether ... [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

(1) Oklahoma tort law and the Atomic Energy Act share the same ultimate purpose of protecting public health and safety.

The central purpose of the Atomic Energy Act and the Commission it establishes is

the protection of public health and safety. § 2(e), 42 U.S.C. § 2012(e). Traditional tort remedies, including punitive damages, to the extent they are successful in shifting the social costs of hazardous enterprises back to those who profit from them, accomplish this same purpose.

Although this case is the first tort recovery for radiation injury caused by an NRC licensee, the NRC itself has admitted that the normal "operation of [nuclear] plants will cost human lives." 46 Fed. Reg. 39580, col. 2 (Aug. 4, 1981). But the peculiar nature of radiation makes proof of the causal relationship between any particular radiation injury and identifiable wrongful conduct extremely difficult. See, e.g., Burcat, "Uncompensated Victims of Low Level Radiation: Unnecessary Hostages of the Price-Anderson Debate," 15 Forum 847 (1980).

Tort remedies thus providing inadequate

deterrence, prior regulation becomes a vital means for preventing routine but non-compensable harm to the public. But where injury can be proven to have occurred as a result of willful or reckless conduct, punitive damages provide a complementary means for achieving the same purpose of deterring harmful conduct. The Court has stated:

> To hold that a state statute identical in purposes with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714, 722 (1963).

(2) The Nuclear Regulatory Commission lacks authority to promote nuclear energy by granting immunity to the nuclear industry from state prohibitions against oppressive, malicious or reckless handling of radioactive materials.

A federal purpose in addition to that of health and safety, namely promoting nuclear power, was found in Northern States Power, 447 F.2d at 1153-54, and constitut-

ed an important ground for that court's decision holding preempted a state regulation more stringent but otherwise identical to an NRC regulation. The Court of Appeals below apparently relied upon this ground when it referred to "the strong federal interest in atomic energy development," 667 F.2d at 922. But promotion of nuclear power is no longer, if it ever was, among the purposes of regulation under the Atomic Energy Act. Although, as shown below, the DOE may have authority to promote nuclear power along with other forms of energy, the issue here is the preemptive effect of NRC regulation.

Energy Reorganization Acts

In response to concern that the Atomic Energy Commission was using lax regulation as a means to promote nuclear power, in 1974, after the decisions in Northern States Power, Congress abolished the AEC and created the NRC to focus exclusively

on the purpose of regulating nuclear power to protect public health and safety; ERDA (later DOE) was given the mission of using subsidies and research to assist nuclear power as well as other energy sources. 42 U.S.C. §§ 5801-5891 (1976), id. 7151(a) (Supp. III 1979). Congress expressly stated that,

> a basic purpose of this Act [is] to separate the regulatory functions of the Atomic Energy Commission from its development and promotional functions, which are transferred to [ERDA]. S. Rep. 93-980, 93rd Cong., 2d Sess. 19 (1974).

Congress clearly expressed its intent that nuclear power was not to be favored over other sources of energy. Thus Congress stated its policy to "develop ... all energy sources." Energy Reorganization Act of 1974, §§ 2(a) & (b), 103, 42 U.S.C. §§ 5801(a) & (b), 5813 (1976). Congress warned

> against an unwarranted priority being given to any energy technology in ERDA. S. Rep. 93-980 supra at 8, 16.

> [Congress drafted the statute] to place greater relative emphasis on nonnuclear energy ... [and] designed ERDA so that its nonnuclear missions are fairly represented and funded along with the nuclear missions of the new agency .... Id. 14.

According "[e]nvironmental protection and safety activities ... overriding importance," id. 17, Congress declared:

> The mission of the new [Nuclear Regulatory] Commission is to ensure the safety and security of the nuclear industry ... and the radioactive fuels used to fuel it. Id. 2.

In the DOE Act Congress clearly stated its intent that federal energy policy be developed in cooperation with the states and in deference to their needs. 42 U.S.C. §§ 7112(11), 7113, 7133(6). This Act again showed that if Congress was biased toward any particular form of energy, it was not nuclear. On the contrary, Congress sought,

> major emphasis on the development and commercial use of solar, geothermal, recycling and other technologies utilizing renewable resources. 42 U.S.C.

§ 7112(6) (Supp. III 1979).

It would be facetious to suggest that a plaintiff should be denied punitive damages for injuries sustained from a recklessly erected windmill or geothermal facility because that would interfere with Congressional policy to promote renewable energy technologies. But nothing distinguishes this proposition from the assertion that "federal interest in atomic energy development," 667 F.2d at 922, is a ground for preempting the state punitive damage award in this case.

Clean Air Act Amendments

In 1977 Congress even more strongly reconfirmed its intent not to promote nuclear power over other forms of energy and not to grant immunity from state law as a means of promotion. In the Clean Air Act Amendments of that year Congress took pains to expressly empower states to regulate airborne radiation. 42 U.S.C. §§

7416, 7422(c). The accompanying report states unequivocally that,

> under the Clean Air Act, emission limitations may be enforced by citizen suit and State and local governments may adopt and enforce more stringent standards than the federal emission or ambient air standards.[8] [Footnote 8: Thus the committee would not preempt States from setting and enforcing stricter air pollution standards for radiation than the Federal standards and would not follow the holding in Northern States Power (citation omitted) in the context of radioactive air pollution]. These authorities and requirements ... would apply equally to radioactive pollutants, including nuclear-related emissions from power plants. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 43 & n.8, (1977). (emphasis added)

Far from granting nuclear or any other energy industry the advantage of immunity from the costs of tort liability, Congress again stated expressly that the

> costs of protecting the public health ... must be considered a cost of doing business for the nuclear power industry just as ... [it is] for the coal-fired generating stations. Id., at 43.

Thus Congress has now eliminated the thrust of the Northern States Power

decision. First, in 1974 it separated regulation and promotion of the production and use of nuclear materials and directed the NRC to regulate exclusively for protection of the public health and safety, and then in 1977 it expressly empowered states to impose regulations more stringent than NRC regulations with respect to radioactive air emissions.

Congress recently reconfirmed its intent that federal agencies defer to state environmental requirements in an Act intended to promote coal, nuclear and other energy sources alternative to petroleum and natural gas. 42 U.S.C. §§ 8301(b), 8302(a)(17), 8322(a)(1)(c), 8352(a)(1)(c) (Supp. IV 1980).

If there were any residual purpose of promotion left to NRC regulation under the Atomic Energy Act it would now certainly be peripheral to the statute's central purpose to allow development of atomic energy

only insofar as it is "consistent ... with the health and safety of the public." Id. § 3(d), 42 U.S.C. § 2013(d). Where conflict is found on a matter peripheral to the central purpose of a federal statute, the Court instructs that,

> the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted. Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).

An exemplary damages award is easily reconciled with any such residual regulatory purpose. First, it punishes only the most unreasonable kind of conduct. Second, tort liability for punitive damages is not prior regulation at all, but addresses only actual, not merely potential, injuries. A single exemplary award in over 25 years of commercial nuclear power cannot realistically constitute a serious impediment to further development of the

multi-billion dollar nuclear industry.

2. CONGRESS HAS NOT EXPRESSLY PREEMPTED STATE EXEMPLARY DAMAGES REMEDIES FOR RADIATION INJURIES.

As stated in Northern States Power,

> no provision of the Atomic Energy Act expressly declares that the federal government shall have the sole and exclusive authority to regulate radiation emissions from nuclear power plants. 447 F.2d at 1147.

Much less does the Atomic Energy Act, or its legislative history, expressly preempt any state common law or statutory remedies for radiation injury. On the contrary, Congress has generally relied upon state tort remedies for remedying radiation injuries, without limitation. The Court below, while recognizing that Price-Anderson generally leaves tort liability for radiation injuries to state law, infra p. 26, acknowledged:

> Nowhere in the Price-Anderson Act or its legislative history have we found express mention of punitive damages. 667 F.2d at 922.

In language that was given preemptive effect in NSP, § 274(k) provides:

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

As simply a savings clause, subsection (k) says nothing express about preemption except that it is not intended in areas not covered by § 274. Moreover, the tort remedies in question here are not "regulations" at all. Regulations impose a general prior restraint on the conduct of all affected actors in order to reduce the possibility of injurious consequences, thereby necessarily restricting innocent and harmless conduct in the process. By contrast, a punitive damages remedy focusses only on actual injury caused by a specific actor through malice and oppression.

3. NOWHERE IN THE ATOMIC ENERGY ACT MAY BE FOUND AN IMPLIED CONGRESSIONAL INTENT TO PREEMPT THE HISTORIC POWER OF STATES TO APPLY ALL THEIR TRADITIONAL TORT REMEDIES FOR PROTECTION OF THE PUBLIC AGAINST ACTUAL RADIATION INJURIES.

Federal preemption may be effected by "implicit legislative design". City of Philadelphia v. New Jersey, 437 U.S. at 621. But preemption of the Oklahoma tort remedy for radiation injury 1) impinges upon the state's historic police power, 2) affects matters of health protection which have traditionally been committed to state power, and also 3) interferes with the enforcement of common law remedies for the vindication of actual injury. Preemption of state power is never "lightly to be presumed." New York State Department of Social Services v. Dublino, 413 U.S. 405, 413 (1973). And in these enumerated areas preemption is not to be implied unless Congressional intent to "effect that result is clearly manifested," or there is

an irreconcilable "repugnance" to federal law. Reid v. Colorado, 187 U.S. 137, 148 (1902).

A) The Court of Appeals failed to apply the standard criteria for determining whether a state law has been impliedly preempted by Congress.

Four criteria were set out in Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), aff'd mem. 405 U.S. 1035 (1972), for determining when Congress has impliedly intended to preempt state law. They are 1) the intent of Congress as shown by statute and legislative history, 2) the pervasiveness of the federal regulatory scheme, 3) the nature of the regulated subject, and 4) whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

There is some question whether these criteria have the same force today as they

did when applied by the Eighth Circuit. (A summary affirmance has weaker precedential value, e.g., Mandel v. Bradley, 432 U.S. 173, 176 (1977)). In any event these criteria were virtually ignored by the Court below.

(1) intent of Congress as shown in statute and legislative history.

To the extent Congress expressed any intent concerning the survival of state remedies for radiation injuries, it clearly assumed that traditional state tort remedies would be freely available to radiation victims. See Silkwood v. Kerr-McGee Corp., 485 F. Supp.566, 573-74 (W.D. Okla. 1979). This Court has never made any distinction between punitive damages and other traditional remedies in applying federal preemption, see cases cited infra at pp. 43-46, and neither did Congress when it enacted the Atomic Energy Act.

The Court of Appeals opinion first says:

> References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them. 667 F.2d at 922.

But the majority concludes, without citing any statute or legislative history that,

> with respect to "extraordinary nuclear occurrences" ... the Price-Anderson Act implicitly assumes that only compensatory damages will be awarded.

In fact, the Price-Anderson Act scrupulously avoids language that might suggest only claims for compensatory damages are covered by its insurance, indemnity and liability limitation provisions. Rather the Act uses broad language clearly including exemplary damages within its scope, such as "public liability claims", § 170 (a), 42 U.S.C. § 2210(a) and passim; "suits for damage" id. (d), (e), (l); and "action" id. (h), (n)(2). Cf. § 170(g) ("compensation"); Teamsters v. Morton, 337 U.S. 252, 260 and nn. 15, 16

(1964) ("damages by him sustained," "actual damages"); City of Newport v. Fact Concerts, 453 U.S. 247, 264-65 (1981) ("compensation," "indemnify"). Indeed, reference to "willful damages" in the legislative history suggests that the prospect of punitive damages for radiation injuries was expressly contemplated by Congress. S. Rep. 2298, 84th Cong., 2d Sess. 8 (1956); "Governmental Immunity," Hearings before JCAE, 84th Cong., 2d Sess. 44, 316 (1956) (§ 169-1(a)(6) of AEC-proposed legislation mentioning damages from "bad faith, willful misconduct or gross negligence").

The Court of Appeals next cites in support of its preemption argument language from Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 93 (1978), where the Court had occasion in an entirely different context to allude to the fact that Price-Anderson provides a

"mechanism for compensating victims," as surely it does. But the Court could not have intended this statement of a truism, by mere implication, to dispose of such an important question as whether NRC licenses may also be constitutionally amenable to actions for exemplary damages where appropriate under state law. The legislative history of the Price-Anderson Act states broadly and unqualifiedly that the Act

> permits retention of state law with respect to the cause of action and the measure of damages. H.R. Rep. No. 2043 and S. Rep. No. 1605, 89th Cong., 2d Sess. 9 (1966).

Finally, the Price-Anderson Act, whatever it might indicate, lacks materiality to this case. This case involved no "extraordinary nuclear occurrence" (ENO), the prerequisite for coverage under Price-Anderson. See 45 Fed. Reg. 27590 (April 23, 1980). Duke Power, 438 U.S. at 88-89 n.33, states that before Price-Anderson persons claiming radiation injuries re-

tained the,

> right ... to utilize their existing common law and state law-remedies to vindicate any particular harm visited upon them from whatever sources.

Tort law relating to radiation injuries not resulting from an "ENO" was left entirely unaffected by the Price-Anderson Act ("in the absence of an extraordinary nuclear occurrence ... traditional concepts should be allowed to prevail;" "minor claims ... remain subject to the traditional rules of tort law." H.R. Rep. No. 2043, supra p. 28, at 11).

(2) pervasiveness of the federal regulatory scheme

The Court of Appeals, presumably alluding to this criterion, observed, without discussion, that the "nuclear industry ... is extensively regulated by a federal agency," 667 F.2d at 923. Automobiles, airplanes, drugs and many other products are extensively regulated by the federal

government yet remain subject to state punitive damage claims when handled recklessly or oppressively. As the Court recently stated:

> We reject ... the contention that preemption is to be inferred merely from the comprehensive character of federal [legislation]. The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. New York State Department of Social Services v. Dublino, 413 U.S. 405, 415 (1973)

See also, De Canas v. Bica, 424 U.S. 351, 359-60 (1976) ("comprehensiveness ... to be expected" in immigration law: no preemption); Askew v. American Waterways Operators, Inc., 411 U.S. 325, 330 (1973) (no preemption notwithstanding "pervasive system of federal control").

The regulatory scheme created by the Atomic Energy Act, while predictably complex, nonetheless deliberately minimized federal inroads into state tort law

("one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law .... [T]he claimants' right to recover is left to the tort law of the various states ...." S. Rep. No. 1605, supra p. 28, 6). The Act itself creates no private cause of action of any kind. Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231, 237-39 (3rd Cir. 1980), cert. denied 449 U.S. 1096 (1981). The Act's liability provisions are far from pervasive. Rather, for non-ENO's, as stated elsewhere,

> Congress has left the area unattended, and no reason exists why the states should not be free to act. Goldstein v. California, 412 U.S. 546, 570 (1973) (Burger, C.J.).

The Act does provide modest civil penalties for violation of license and regulatory provisions, as well as criminal sanctions. See AEA § 234, 42 U.S.C. § 2282. But licenses and regulations say nothing about liability for tortious -- let

alone recklessly or willfully inflicted -- injuries caused by licensees. Hence these provisions cannot be regarded as direct substitutes for tort actions. Moreover, the original maximum amount of civil penalties allowed, $5000 per violation and $25,000 for all violations occurring in a 30 day period, is no substitute for the deterrent effect of substantial tort recovery, including exemplary damages, where conduct of a multi-billion dollar corporation has been proven to be oppressive, malicious, or reckless of human life. 42 U.S.C. § 2282(a) (1976) (amended 1980).

(3) "nature of the regulated subject"

This criterion has been defined as including a) any subject "by its very nature admitting only of national supervision, cf. Cooley v. Board of Port Wardens, 12 How. 299 [1851]," or b) any subject that demands "exclusive federal regulation

in order to achieve uniformity vital to the national interest." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 143-44 (1963) (emphasis added).

a) Damage awards for injuries from reckless, oppressive or malicious management of nuclear facilities no more require "national supervision" than they would for a coal fired plant or other energy source.

The Court of Appeals stated, without discussion, that the "nuclear industry ... is closely linked to national security," 667 F.2d at 923, presumably alluding to test "a" quoted above. National security is of course a responsibility of the federal government suitable for exclusively national supervision. But not all state legislation pertaining to matters that are "linked" to national security is preempted. States regulate firearms, highways, education, heavy industry and countless matters "linked" in various ways with national security. Unlike truly military

affairs, see Feres v. United States, 340 U.S. 135 (1950); Jaffee v. United States, 663 F.2d 1226 (3rd Cir. 1981) (en banc), cert. denied 50 U.S.L.W. 3910 (May 18, 1982), activities involving these matters are not accorded an immunity from tort damages.

Congress' clearly expressed intent that states do have a role to play, not only in enforcing state remedies for radiation injuries but also by assumption of regulatory powers under the Atomic Energy Act, § 274, 42 U.S.C. § 2021(a)(1) & (2), shows that Congress does not consider the use of nuclear materials to admit "only of national supervision." Indeed, the Commission was authorized to enter into agreements with states under which it could, with certain exceptions, discontinue its regulatory authority under the Act for regulating nuclear materials and transfer this authority to contracting states.

Id. (b). Nowhere does the Act or its legislative history suggest that federal regulation of nuclear energy is to be exclusive.

b) Congress has not expressed a need for uniformity among the states in the assessment of punitive damages for reckless or malicious management of nuclear facilities, or for any other punitive measures with regard to management of nuclear facilities.

While the Act provides that radiation standards should be developed for the "guidance of Federal agencies," which term arguably intends uniformity, only "cooperation" was sought with the States concerning the same standards, AEA § 274(a) (6). "Cooperation" suggests more flexibility and reciprocal concession, more tolerance of variety than does the term "guidance". Thus § 274 suggests that Congress did not consider uniformity necessary at the State level for fixing environmental radiation standards.

This interpretation was confirmed by the Reorganization Plan No. 3 of 1970, by which regulation of radiation standards came under the jurisdiction of the EPA. 5 U.S.C. app. at 609, 84 Stat. 2086, 3 C.F.R. § 1072. Under this Plan, EPA was to set generally applicable standards for the protection of the environment from radioactive materials. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 24 n.20 (1976). Where the EPA has authority to fix radiation pollutant standards, concurrent state-imposed standards are not subject to preemption. Id. 22 (water); 42 U.S.C. § 7422 (air).

No "unambiguous congressional mandate," 373 U.S. at 147, can be found which states that uniformity is needed in setting environmental standards, or the standard of care, appropriate to deter radiation injuries. In fact, the opposite is clearly implied.

(4) Whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"

The NSP court dealt with this test under the rubric "implied preemption." This test also relates to "conflict," where it has been discussed above, pp. 9-21.

Congress does not intend NRC regulation to serve the promotion of the nuclear industry. Supra, pp. 14-16. State tort law complements the NRC's regulatory purpose to promote health and safety, supra pp. 10-13. In any event, the Oklahoma punitive damages statute presents no obstacle to the further development of atomic energy, supra p. 20. Exemption from punitive damages is not "essential to the financial soundness" of the nuclear industry or the "preservation of [its] very existence." Fidelity Federal S. & L. Assn. v. de la Cuestra, --- U.S. ---, slip op. at 13, 28 n. 23 (June 28, 1982).

B) The Court of Appeals created a new test for finding implied preemption never before applied by the courts.

The Court of Appeals could not find actual conflict between the Oklahoma punitive damages statute and the Atomic Energy Act nor an implied intent to preempt under the accepted tests. Instead it adopted a wholly new "substantially competes" test, 667 F.2d at 923. By this the Court of Appeals apparently meant that the state law accomplished the same goal, i.e. deterrence of oppressive or malicious handling of nuclear material, as federal regulation.

This new test is not part of the conflict theory of preemption, because the "competition" in this case involves not conflicting but compatible purposes. Nor does the new test fit any of the accepted criteria under the implied intent theory of preemption. Yet this test provides the principal statement of the rationale for the Court of Appeals' decision below.

The creation of this new test by the Court of Appeals provides a major reason why the Court should take jurisdiction of this case so as to disavow the implications such a test might have for the validity of numerous state laws which touch on matters covered by federal legislation.

C) The Court of Appeals failed to give effect in this case to well-established presumptions against preemption.

As noted earlier, preemption of state laws by federal law is never to be assumed. Seventy years ago this Court laid down the basic principle in Savage v. Jones, infra p. 42, 225 U.S. at 533, that preemption of state police powers is not to be implied in the absence of actual conflict with an Act of Congress.

In this case the federal law does not provide a remedy to Karen Silkwood's estate for the damages suffered by her before her death nor is the federal law in "actual conflict" with the state law.

When faced with comparable situations this Court has consistently refused to strike down state law. These decisions have reflected basic legal principles which are fundamental to a truly federal system of government. The Court of Appeals' decision in this case violates those legal principles.

(1) Considerations of federalism create a presumption against preemption of state health and safety protections under traditional state police powers.

In Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) the Court stated,

> we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. See also Reid v. Colorado, 187 U.S. 137, 148 (1902) (emphasis added).

Justice Rehnquist states the democratic underpinning of this principle as follows:

> This assumption derives from our basic constitutional division of legislative competence between the States and Congress; from "due regard for the presuppositions of our embracing federal system, including the principle of dif-

> fusion of power not as a matter of doctrinaire localism but as a promoter of democracy ...." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959) (emphasis added). Unless the requisite pre-emption intent is abundantly clear, we should hesitate to invalidate state and local legislation for the added reason that "the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power remains free to remove the burden" (citation omitted). City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 643 (1973) (dissent).

See also Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). The general rule of deference to legislation within the state's historic police powers is given special weight when, as here, health and safety issues are involved. E.g., Maurer v. Hamilton, 309 U.S. 598, 614 (1940) (preemption must be "clearly indicated ... especially when public safety and health are concerned"). But this most traditional of the state's police powers was denied here on the merest "speculation about the unexpressed intent of Congress,"

New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 545 (1979), rather than on the basis of the required,

> explicit declaration of congressional design to displace state regulation. Florida Lime, 373 U.S. at 143.

In Savage v. Jones, 225 U.S. 501, 533. (1912) the Court foreclosed the approach the Court of Appeals took in this case:

> [I]ntent to supersede the exercise by the State of its police powers as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the Act of Congress fairly interpreted is in actual conflict with the law of the State.

The Court of Appeals violated this long standing principle when it simply equated punitive damages with regulation, which in fact is entirely different, infra pp. 51-52, and then, from the "mere fact that Congress has seen fit to circumscribe its regulation" of radiation hazards, without any consideration of actual conflict,

infers that whatever can be denominated "regulation" of radiation -- though nowhere covered or even mentioned in the federal statute -- is necessarily preempted by it, 667 F.2d at 922.

(2) State tort law cannot be preempted in the absence of clear and unavoidable conflict with a federal statute

Protecting the residual powers and sovereignty of the states is the very essence of federalism, and this Court has consistently protected state tort law from federal preemption absent unavoidable conflict with federal law. This concern to protect state tort law from federal preemption is illustrated in several cases decided by the Court in recent years.

In Nader v. Allegheny Airlines, 426 U.S. 290 (1976), plaintiff was awarded $10 actual and $25,000 punitive damages in his common law claim arising out of overbooking on an airline regulated by the Civil Aviation Board. CAB regulations covered

the subject of overbooking and defendant claimed that this regulation preempted the field. Although this was not an area relating to traditional police powers and it was not clear that state regulation of this activity would be preempted, the Court rejected defendant's argument, upholding a presumption that common law rights are not abrogated by a subsequent federal statute,

> unless it is found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy, in other words, render it nugatory. Id. at 298. ...[W]here Congress has sought to confer ... power [to immunize from common law tort liability] it has done so expressly, Id. at 301 (emphasis added).

In Nader the Court refused to preempt in the absence of actual conflict:

> [T]here is no board requirement that air carriers engage in overbooking.... [T]he common law action and the statute are not "absolutely inconsistent" and may coexist .... Id.
> ... [M]ere compliance with agency regulations is not sufficient in itself under the Act to exempt a carrier from

common law liability. Id. 308 n. 19.

In the field of labor law the preemption doctrine has developed primarily by judicial decision because of the perceived need for a national labor relations policy warranting a broader than usual preemptive reach for federal law. Distinctions developed in this area can provide a useful indication of the extreme limits of preemption under the Atomic Energy Act. In this field, as elsewhere, the Court has consistently preserved against preemption the right of the states to enforce traditional common-law remedies, including punitive damages, for tortious conduct. See United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1950) ($100,000 punitive damages on a state tort claim for what was also an unfair labor practice). This preservation of state tort law applies not only to damage actions for direct physical harm, as was

involved in Silkwood, but even extends to such other torts as libel, Linn v. Plant General Workers, 383 U.S. 53 (1966), intentional infliction of mental distress, Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 302-03 (1977) ($175,000 punitive damages), and interference with lawful occupation, Automobile Workers v. Russell, 356 U.S. at 641 ($9500 punitive damages; $500 for back wages though the federal Act presumably would provide back pay award).

In Farmer the Court articulated a test to define those tort claims that would not be preempted by federal law, even where a federal tribunal has jurisdiction over the same conduct. State remedies will not be preempted when, 1) "there existed a significant state interest in protecting the citizen from the challenged conduct," 2) "the respective controversies presented to the state and federal forums would not have

been the same," and 3) "state regulation of the conduct alleged in the complaint would [not] result in prohibition of conduct protected by the federal Act." See Sears Roebuck & Co. v. Carpenters, 436 U.S. 180, 196-97 & nn.25,26 (1978) (summarizing three Farmer criteria).

It requires no discussion to show that if the Silkwood case were subjected to this test by which punitive damages were upheld from preemption in Farmer, each of these three criteria would be easily satisfied and the decision below reversed.

In United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 665 (1950), the Court concluded:

> To the extent ... that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. ...The primarily private nature of claims for damages under state law also distinguish them in a measure

> from the public nature of the regulation of future labor relations under federal law.

The decision in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), illustrates how far federal law must go to preempt state tort law. While holding a state law that enjoined and punished peaceful picketing preempted because it did not involve protection against violent conduct and because it punished action specifically protected, and not merely allowed, by federal law, the Court articulated the basic notion that

> in the absence of compelling congressional direction, we could not infer that Congress had deprived the state of the power to act. 359 U.S. at 243.

Cited with approval in New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 540 (1979), upholding a New York statute granting employer-financed unemployment compensation to striking workers not preempted by federal labor law notwith-

standing the disruption this entailed for federal promotion of balance in negotiating strength between labor and management. The dissent in New York Telephone agreed that,

> laws protecting against personal torts or violence to property ... have defined the "local feeling and responsibility" exception to preemption. 440 U.S. at 560 (emphasis added).

Although this Court has not squarely faced the issue of preemption as related to aircraft noise and state common law nuisance claims for damages, the issue has been decided by state supreme courts. E.g., Greater Westchester v. City of Los Angeles, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), cert. denied, 499 U.S. 820 (1981). These courts have found that although as held in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), state or local regulation of airport noise was preempted by federal

regulations, state tort law providing damages for noise within the federal standards was not preempted.

These cases illustrate the important distinction, ignored by the court below but clearly recognized in the airline overbooking and labor cases, that providing damages -- whether punitive, compensatory or both -- for conduct subject to federal regulations is not the equivalent of regulating the conduct, and thus absent express Congressional intent or actual conflict with federal law the state tort law will be protected from federal preemption.

II THE AWARD OF PUNITIVE DAMAGES IN THIS CASE CAN BE EASILY DISTINGUISHED FROM THE STATE REGULATION PREEMPTED IN NORTHERN STATES POWER v. MINNESOTA.

The only other Court of Appeals decision to preempt state law relating to radiation -- Northern States Power -- held that

> the federal government has exclusive authority under the doctrine of preemption to regulate the construction and operation of nuclear power plants,

> which necessarily includes regulation of the levels of radioactive effluents discharged from the plant. 447 F.2d at 1154.

Properly limited to its facts, NSP may still define the valid scope of implied preemption under the Atomic Energy Act. But the following points easily distinguish NSP from the instant case:

1) Only "regulation" is mentioned in § 274(k), 42 U.S.C. § 2021(k), the source of Congress' implied intent to preempt. The regulation involved in NSP is substantially different than the state tort remedy involved here which is not a "regulation" at all. Silkwood involves a remedy for actual injuries rather than prevention of predicted harms. The Atomic Energy Act creates no private damages action for injuries. Accordingly, the "respective controversies" as between an NRC enforcement proceding and a tort action including a punitive damages claim are not

even remotely "the same." Supra p. 47.

2) NSP dealt with water effluents. Karen Silkwood was injured through inhaling plutonium into her lungs, hence necessarily from an airborne source of pollution. The Clean Air Act and its legislative history expressly state that state power to regulate airborne radioactive pollutants is not to be preempted. Supra p. 18.

3) The Oklahoma statute, unlike the Minnesota statute, is a law of general applicability not directed only at nuclear materials but rather at all forms of oppression and malice. The plurality opinion held

> that a congressional intent to deprive the states of their power to enforce such general laws is more difficult to infer. New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 533 (1979).

4) The question of punitive damages for reckless or malicious management of a nuclear facility is peripheral to the cen-

tral purpose of the Atomic Energy Act, and the regulations pursuant thereto, whereas the Minnesota regulation involved in the NSP case was virtually identical in form and purpose to the federal regulation except that it enforced stricter numerical standards for radioactive effluents than did the federal regulation. As stated in San Diego Building Council v. Garmon, 359 U.S. 236, 243 (1959),

> due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power ... as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate ... activity [of] merely peripheral concern to [the Federal Act].

5) The only brief filed in the Supreme Court in support of the Northern States Power decision relied heavily on the following concern:

> To permit the various States to enact differing regulations with respect to radioactive discharges would result in variations in nuclear plant design and operating procedures from State to

> State and might significantly frustrate efforts to develop a safe and reliable nationwide system of nuclear power generation. "Memorandum for the United States as Amicus Curiae," 6.

Such a concern for uniform plant design, even if it were more real than theoretical, can be of no pertinence to a punitive damages action which addresses oppressive or malicious conduct at this or any factory, not power plant design objectives.

6) NSP was decided in 1972, prior to Congress' clear delineation of the NRC's primary purpose under the Atomic Energy Act to regulate for the promotion of public health and safety, not nuclear energy.

III REVOCATION OF STATE PERSONAL INJURY TORT REMEDY BY IMPLIED PREEMPTION RAISES IMPORTANT ISSUES OF FEDERALISM AND MAY VIOLATE THE TENTH AND FIFTH AMENDMENTS.

In Cooley v. Board, 12 How. at 326, Justice Daniels, concurring, expressed the view that certain powers are inherent in the states and cannot be wholly preempted

by federal law. He stated:

> The power delegated to Congress by the Constitution ... do[es] not necessarily nor even naturally extend to the means of precaution and safety adopted within the ... limits of the States .... These last subjects are essentially local .... This is a power which is deemed indispensible to the safety and existence of every community. It may well be made a question, therefore, whether it could, under any circumstance, be surrendered; but certainly it is one which cannot be supposed to have been given up by mere implication .... [T]his is an original and inherent power in the States, and not one to be merely tolerated, or held subject to the sanction of the federal government.

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 91 (1978) upheld the ENO liability limitation provision of the Atomic Energy Act, stating that plaintiffs received "a fair and reasonable substitute." While Price-Anderson gave claimants a waiver of defenses, the Atomic Energy Act of 1954 gave affected persons no substitute for a state-law punitive damages action -- neither a federal cause of action for damages nor even a pri-

vate action to enjoin conduct destined to injure them. Supra p. 31. A statute that destroys a common law right without providing a reasonable substitute raises a serious question of violation of Fifth Amendment due process rights. It is the policy of the Court to interpret ambiguous statutes so as to avoid constitutional issues.

The traditional remedy of punitive damages is no less important than other forms of damage under this due process analysis. In many states punitive damages encompass some forms of compensatory damage such as mental distress, or are intended to compensate for expenses of vindicating the public's rights through litigation. It was well stated that,

> The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential and unscrupulous, vindi-

> cates the right of the weak and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by criminal law. Luther v. Shaw, 157 Wis. 234, 238, 147 N.W. 18, 20 (1914).

CONCLUSION

The Court of Appeals' decision overturning the Oklahoma jury's award of punitive damages on grounds of federal preemption should be reversed and the award should be reinstated.

Respectfully submitted,

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APPENDIX

23 Okla. Stat. § 9. Jury may give exemplary damages, when

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.